

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

NORTHWEST AQUATIC ECOSYSTEMS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NOS. 05-035; 05-036; 05-
046, 05-047

ORDER ON SUMMARY
JUDGMENT

Appellant, Northwest Aquatic Ecosystems, (Northwest Aquatic) is challenging denials of coverage under the Aquatic Nuisance Plant and Algae NPDES General Permit (Aquatic Nuisance Permit) issued by the Washington Department of Ecology (Ecology) for the following lakes:

Lake Palmer	PCHB No. 05-035
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Lake Killarney, Cherry Pond	PCHB No. 05-036
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Lake Ketchum	PCHB No. 05-046
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Lake Arrowhead, Fawn Lake, Ken Lake	PCHB No. 05-047
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The Department of Ecology has filed a summary judgment seeking dismissal of the case.

In considering this motion the Board, comprised of William H. Lynch, Bill Clarke and David W. Danner, reviewed the following:

1. Ecology's Motion for Summary Judgment with exhibits.

2. Declaration of Betsy Dickes.

ORDER ON SUMMARY JUDGMENT
PCHB NOS. 05-035, 036, 046, 047 (1)

3. Declaration of John T. Cooke.
4. Declaration of Tricia Shoblom.
5. Appellant's Response to Motion for Summary Judgment with attachments.
6. Ecology Reply Brief.

The matter was decided on the record without oral argument. Based upon the records and files in the case and the evidence submitted, the Board enters the following decision.

Facts

Ecology is responsible for regulating the application of herbicides and algaecides into the waters of Washington, in part, through its delegated operation of the National Pollutant Discharge Elimination System (NPDES) permit system. (RCW 90.48.260). On June 13, 2002, Ecology exercised this responsibility by issuing a general permit governing the application of herbicides and algaecides known as the Aquatic Nuisance Plant and Algae Control National Pollutant Discharge Elimination System Waste Discharge General Permit. (Aquatic Nuisance Permit). The permit became effective on July 5, 2002, and has a term of five years, expiring in July 2007.

Northwest Aquatic is a company that provides treatment for nuisance plants and algae in a number of lakes within the state. The requirements enunciated in the Aquatic Nuisance Permit imposed additional tasks on applicators such as Northwest Aquatic Ecosystems and its clients. The Permit allowed five years of coverage under the general permit for permittees if an Integrated Aquatic Vegetation Management Plan (IAVMP) was prepared for the lake and approved by Ecology. The need for such a plan was first initiated in the 2002 Aquatic Nuisance

1 Permit. In preparing IAVMPs, meaningful analysis and effort is required to investigate relevant
2 topics and develop long-term strategies for aquatic nuisance weed control. The Aquatic
3 Nuisance Permit did allow permittees without an approved IAVMP to obtain two annual
4 coverages during the five year permit period. A format for the IAMVP was attached as
5 Appendix A to the General Permit.

6 Aquatechnex, an aquatic nuisance treatment contractor, timely appealed the Aquatic
7 Nuisance Permit in June 2002. The Pollution Control Hearings Board (PCHB) ultimately
8 dismissed the appeal pursuant to a motion for summary judgment. The Aquatic Nuisance Permit
9 remained effective and numerous lake associations were granted annual coverage during the first
10 two lake treatment seasons.

11 In 2004, however, when Northwest Aquatic filed applications with Ecology for permit
12 coverage to treat twelve lakes during the 2004 treatment season, the coverage was denied. The
13 denial was based on the fact the applicants did not have approved IAVMPs and had already been
14 granted two annual permit coverages. Ecology believed additional coverage could not be
15 extended under the terms of the general Aquatic Nuisance Permit until an IAMVP was approved.
16 Northwest Aquatic appealed Ecology's denials to the PCHB. The appeal actions were
17 consolidated for consideration by the Board. (PCHB Nos. 04-026, 04-027, 04-033, 04-038, 04-
18 039, 04-040, 04-042, 04-043, 04-047, 04-048, 04-054).

19 Prior to the scheduled hearing date in that consolidated case, Northwest Aquatic entered
20 into a settlement with Ecology. The settlement agreement concluded the issues in the case and
21 served as the basis for dismissal of the appeals. It allowed certain treatment to move forward for

1 the 2004 season on the basis of conditionally-approved IAVMPs for five of the twelve lakes.
2 The conditional approval required applicants to submit revised IAVMPs no later than December
3 31, 2004, in order to be permitted to treat beyond the 2004 season. The settlement also allowed
4 Northwest Aquatic to submit IAVMPs for the remaining seven lakes for Ecology's conditional
5 approval.

6 IAVMP plans were submitted to Ecology for the lakes in controversy before the
7 December 31, 2004, deadline in the settlement agreement.¹ In or around February 2005,
8 Northwest Aquatic began submitting Notices of Intent (NOIs) to Ecology seeking coverage for
9 the 2005 treatment season under the Aquatic Nuisance Permit. Ecology denied the requested
10 coverage because it had not yet approved the IAVMP plans.

11 Ecology is moving for summary judgment dismissing all the appeals on the basis that
12 coverage under the Aquatic Nuisance Permit for the lakes in controversy is dependent on having
13 an approved IAVMP.

14 Analysis

15 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
16 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
17 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
18 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
19 Summary judgment is appropriate when the only controversy involves the meaning of statutes,

20 ¹ There appears to be a dispute over the data the plan for Lake Palmer was submitted. For purposes of this motion
21 for summary judgment the facts will be interpreted in a manner most favorable to Northwest Aquatic, the non-
moving party.

1 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
2 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d
3 1004 (1991).

4 The party moving for summary judgment must show there are no genuine issues of
5 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
6 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
7 summary judgment proceeding is one that will affect the outcome under the governing law.
8 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). All facts and reasonable inferences
9 must be construed in favor of the nonmoving party in a summary judgment. The motion should
10 be granted only if, from all the evidence, reasonable persons could reach but one conclusion.
11 *E.g., Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); *Vasquez v.*
12 *Hawthorne*, 145 Wn.2d 103, 106, 33 P.3d 735 (2001).

13 The uncontested facts show none of the lakes in controversy have an approved IAVMP²
14 and all of the lakes have already been allowed general permit coverage for two one-year periods
15 without an IAVMP. Under the terms of the Aquatic Nuisance Permit, an approved IAVMP is
16 required before further periods of coverage can be allowed during the five-year permit cycle.
17 Accordingly, Ecology contends its decisions are appropriate and the appeals should be
18 dismissed.

19 Northwest Aquatic raises a number of issues opposing the summary judgment. Initially,
20 the company points to recent action by the federal Environmental Protection Agency (EPA),

21 ² During the pendency of this case, IAVMP plans for Lake Ketchum, Lake Killarney and Cherry Pond were
approved by Ecology. Those lakes are no longer in controversy.

1 which has issued both an “Interpretive Statement on Application of Pesticides to Waters of the
2 United States in Compliance with FIFRA” and notice of a proposed revision to the Code of
3 Federal Regulations relating to application of pesticides to water of the United States. The
4 material submitted in connection with this motion indicates EPA is currently taking the position
5 that NPDES permits are not required under the Clean Water Act if pesticides are applied in
6 compliance with of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C.
7 Sec. 136 et seq. Northwest Aquatic claims this position is controlling and should override
8 Ecology’s position on the need for Aquatic Nuisance Permit coverage.

9 In connection with this argument, Northwest Aquatic points to RCW 90.48.465, which
10 the legislature adopted when the need for an NPDES permit was first identified in federal
11 litigation. RCW 90.48.465 provides:

12 (6) The fee for a general permit or an individual permit developed solely as
13 a result of the federal court of appeals decision in [*Headwaters, Inc. v.*](#)
14 [*Talent Irrigation District, 243 F.3rd 526 \(9th Cir. 2001\)*](#) is limited, until
15 June 30, 2003, to a maximum of three hundred dollars. Such a permit is
16 required only, and as long as, the interpretation of this court decision is not
overturned or modified by future court rulings, administrative rule making,
or clarification of scope by the United States environmental protection
agency or legislative action. In such a case the department shall take
appropriate action to rescind or modify these permits.

17 Ecology argues the Board lacks jurisdiction to consider the applicability of EPA’s action. While
18 the Board does not have the authority to resolve controversies over the impact of EPA action
19 under federal law, the Board is able to interpret the applicability of a state statute such as RCW
20 90.48.465 to a case before it. The facts on the record of this summary judgment, however, are

1 insufficient for the Board to rule on the applicability of RCW 90.48.465. The issue is set over
2 for hearing where further evidence can be received.

3 Northwest Aquatic contends Ecology has improperly failed to meet the deadlines in the
4 settlement agreement and has failed to create an IAVMP process that is reasonable and capable
5 of being accomplished in a timely fashion. The Board has ruled previously that it has no
6 authority to direct Ecology's use of its resources. (Northwest Aquatic Ecosystems v. Ecology,
7 PCHB No. 04-126, Order Granting Summary Judgment (February 1, 2005). The Administrative
8 Procedures Act places jurisdiction over claims for an agency's failure to act in the Superior
9 Court. The appeal of agency inaction is governed by RCW 34.05.570(4)(b), which provides in
10 pertinent part:

11 (b) A person whose rights are violated by an agency's failure to
12 perform a duty that is required by law to be performed may file a petition
13 for review pursuant to RCW 34.05.514, seeking an order pursuant to this
subsection requiring performance.

14 RCW 34.05.514 allows a petition for review in superior court, not before an administrative
15 agency such as the Pollution Control Hearings Board. RCW 34.05.570(4)(b).³ The Board has
16 not jurisdiction to provide relief on Ecology's failure to provide a timely process, and partial
17 summary judgment dismissing the argument is therefore granted to Ecology.

18 X.

19 Northwest Aquatic claims Ecology cannot deny coverage under the Aquatic Nuisance
20 Permit if an IAVMP has been filed for review even if it has not been approved. Ecology

21 ³ While RCW 34.05.570(4)(b) technically provides an opportunity for a remedy for an agency's failure to act, the Board is aware that this remedy may be too time consuming to be meaningful in this case.

1 contends the general permit requires IAVMP submittal and approval before coverage can be
2 extended beyond two years. The general permit's language does not support Northwest
3 Aquatic's assertion. The permit discusses coverage as follows:

4 The length of coverage for a Permittee is variable according to the
5 following criteria,

6 1. For those Permittees with an Integrated Aquatic Vegetation
7 Management Plan (IAVMP) which may also be known as a Lake
8 Management Plan or Roadside Vegetation Management Plan (for some
9 indirect applications) which:

10 a. has been prepared and approved in accordance with the criteria
11 of the Department of Ecology (approved by the Department of Ecology),
12 and

13 b. which specifies year-by-year proposed actions and monitoring,
14 and

15 c. has been subject to public comment,

16 the period of coverage is for the period of this general permit. See Special
17 Condition S2. for those applications that must have an IAVMP and
18 Appendix A. for the criteria for an acceptable IAVMP. The format for the
19 Roadside Vegetation Management Plan is not specified but it is expected to
20 incorporate Integrated Pest Management principles and include Best
21 Management Practices (BMP's) for avoiding the application of herbicides
 to surface waters.

2. For those Permittees without an IAVMP or RVMP, the length of
coverage per application is one year and only two coverages per permit
cycle (5 years) are allowed. Permittees who want to conduct annual
plant control activities must submit an IAVMP or RVMP before the
third year of coverage. Submittal of an IAVMP or RVMP by the
Permittee which is subsequently approved by Ecology will allow
coverage for the remainder of the term of this General Permit.

Aquatic Nuisance Permit, Condition S1.(E).

1 The coverage provisions, read as a whole, are unambiguous and require more than mere
2 submittal of a draft plan for Ecology approval before coverage is extended beyond the two
3 allowed one-year coverages. Summary judgment is granted to Ecology rejecting the argument
4 that mere submittal of a draft plan is adequate to obtain extended general permit coverage.

5 Based upon the foregoing analysis the Board enters the following

6 ORDER

- 7 1. Ecology's Motion for Summary Judgment is granted dismissing the issue of
8 whether the need for NPDES permit coverage has been eliminated by recent EPA
9 action. The Board lacks jurisdiction over issues of federal law.
- 10 2. Ecology's Motion for Summary Judgment is denied to the extent it seeks
11 dismissal of arguments involving the applicability of RCW 90.48.465 to this case.
12 Arguments on this issue are set over for hearing.
- 13 3. Ecology's Motion for Summary Judgment is granted dismissing the appellants'
14 argument and that submittal of a draft plan supports extended permit coverage.
15 Summary judgment is further granted dismissing appellants' argument that
16 Ecology failed to provide a timely and achievable process because the Board
17 lacks jurisdiction to provide a remedy for the agency's failure to act.
- 18 4. The case is set over for hearing on the issue of whether Ecology properly denied
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1 approval of the IAVMP plans in question and the associated applications for coverage
2 under the Aquatic Nuisance Permit.

3 Dated this 20th day of July 2005.

4 POLLUTION CONTROL HEARINGS BOARD

5 BILL CLARKE, CHAIR

6 WILLIAM H. LYNCH, MEMBER

7 DAVID W. DANNER, MEMBER

8 Phyllis K. Macleod
9 Administrative Appeals Judge
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